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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 128

IN THE MATTER OF

BARBARA BURRUS ET AL.

PETITIONERS

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICUS CURIAE

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Interest of the Commonwealth As Amicus Curiae

The Commonwealth of Massachusetts in and through the District Attorney's Office in the County of Middlesex, is respondent in a juvenile case on appeal to the Massachusetts Supreme Judicial Court. The case is set down for oral arguments in November, 1970. The case of *Commonwealth* v. *Kelley, et al.*, much like the current Supreme Court case of *In Re Burrus*, cert. granted, 397 U.S. 1036 (1970) involves one single but important question to the Commonwealth of Massachusetts: Does a juvenile offender have a right to a jury trial in his juvenile hearing?

On June 16, 1970 the defendants Arthur H. Thomas, Brian J. Kelley and Robert Owens, truly known as George Kelley, demanded a jury trial in their juvenile hearing.

Their motions were denied. Subsequently, the defendants were found guilty of delinquency by reason of assault and battery with a dangerous weapon, the victim having been shot in the leg by a high powered pellet gun. These juveniles were then committed to the Massachusetts Youth Service Board.

In 1956, the Supreme Judicial Court of Massachusetts laid to rest any suggestion that a juvenile had a right to a jury trial. Rather, the decision in *Commonwealth* v. *Bigwood,* 334 Mass. 46 (1956), emphasized the point that a child does *not* have a right to a jury trial in his juvenile proceedings.

It is for this express reason that the Commonwealth of Massachusetts files this brief Amicus Curiae pursuant to rule 42 (4) of the Rules of The Supreme Court, amended 1967.

Summary of Argument

I. The juvenile defendants charged herein do not have a right to a jury trial within the meaning of the Sixth Amendment to the United States Constitution. The framers of the Constitution and especially the Sixth Amendment intended that the protection to be afforded defendants charged with crime should be that defendants would be "judged by their peers." It is impossible under present day standards for the selection of jurors, that juveniles could ever be "judged by their peers."

II. Juvenile proceedings are humane and civil in nature. The juvenile hearing is not classified as a regular criminal proceeding. For this reason and because of the doctrine of stare decisis, juveniles have no constitutional right to a jury trial within the meaning of the Sixth or Fourteenth Amendments to the United States Constitution.

Argument

I.

THE JUVENILE DEFENDANTS HEREIN CHARGED DO NOT HAVE A RIGHT TO A JURY TRIAL WITHIN THE MEANING OF THE SIXTH AMENDMENT. THE FRAMERS OF THE CONSTITUTION AND ESPECIALLY THE SIXTH AMENDMENT INTENDED THAT THE PROTECTION TO BE AFFORDED DEFENDANTS CHARGED WITH CRIME SHOULD BE THAT DEFENDANTS WOULD BE "JUDGED BY THEIR PEERS." IT IS IMPOSSIBLE UNDER PRESENT DAY STANDARDS FOR THE SELECTION OF JURORS, THAT JUVENILES COULD EVER BE "JUDGED BY THEIR PEERS."

The Sixth Amendment entitles one accused of crime to be "tried by an impartial jury." The meaning of the phrase "trial by an impartial jury," within the context of the Amendment, was set out most clearly by Mr. Justice Sutherland, deciding *Patton* v. *United States:*

> "[T]hat it means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and in England when the Constitution was adopted, is not open to question."
>
> *Patton* v. *United States.*
> 281 U.S. 276, 288 (1930)

One of the essential elements recognized in this country and in England under the Common Law, was the right to trial by jury "of one's peers." The peer group selected to be jurors at the accused's trial should be persons who would be "indifferent and free from prejudice." See, *United States* v. *Burr,* Fed. Cas. No. 14,692g and 14,693 (Cir. Ct. D.Va., 1807).

While the Commonwealth will agree that jury trials are "fundamental to the American scheme of justice and due process . . . Duncan at 149.", the Commonwealth maintains that this court must look to see exactly what "due process of law" originally meant, especially with regards to just who is entitled to a trial by jury, as did Mr. Justice Black in his dissenting opinion rendered in *In Re Winship*. Mr. Justice Black stated:

> "Due process of law" was originally used as a shorthand expression for governmental proceedings according to the "law of the land" . . . Both phrases are derived from the laws of England and have traditionally been regarded as meaning the same thing. The *Magna Charta* provided that:
>
> No *freeman* shall be taken, or imprisoned, or be disseised of his freehold, or . . . be outlawed or exiled, or otherwise destroyed; *nor will we not pass upon him, nor condemn him but by lawful judgment of his peers . . .*" (Emphasis supplied)
>
> *In The Matter of Winship,*
> 90 S.Ct. 1068 at 1080 (1970)

The whole history of the Sixth Amendment as it applies to the "fundamental scheme of justice" forthcoming to all American citizens, reveals the fact that persons charged with regular criminal acts were to be "emancipated" persons who had their right to jury trials by other "emancipated" jurors either residing in the same neighborhood with the accused, were of the same vicinage as the accused or, at the very minimum, were of somewhat the same "age" bracket as the accused. The aforestated rationale would then satisfy minimum standards of defendants being judged by an "impartial jury who were their peers." See, Heller, *The Sixth Amendment*, PP-17-29 (1951).

Examples are abundant which uphold the previous paragraph. Provisions for trials by only the defendants' peers can be found in the history of colonial America long before the drafting of our Constitution and the Sixth Amendment. In the Constitution for the Province of East Jersey 1683, it was written:

> "No person or persons within the said Province shall be taken and imprisoned, or be devised of his freehold, free custom or liberty . . . or [in] any other way destroyed; nor shall . . . *judgement be pass'd upon them but by lawful judgement of their peers . . . tryals shall be by twelve freehold men, and as near as may be, peers and equals, and of the neighborhood, and freehold men without just exception . . .*" (Emphasis supplied)
>
> Thorpe, *The Federal And State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies, Now and Heretofore Forming the United States of America,* (Washington: Government Printing Office, 1909) V.1, PP's. 2580, 2581.

Before the signing of the Declaration of Independence and during the period of Colonial Virginia, jury trials therein differed from those held in the Mother country (England) with respect to two requirements. They were, that a jury in Virginia be drawn from (1) the same vicinage as the accused and (2) the same relative "age" bracket. (i.e.—age of emancipation) As was stated by Mr. Heller in his book, *The Sixth Amendment,* at page 20:

> "As [in] all cases involving loss of life or limb . . . the jury seems to have been selected . . . by statute . . . by providing that the sheriff of the accused's county was to summon six freeholders from the neighborhood

for jury service, while the other six members of the panel would be selected from the Court's bystanders if they were fit gentlemen of relatively the same age as the accused as had been the custom. A strict property qualification further limited the number of those eligibles for jury service."

Heller, *The Sixth Amendment*, 20, (1951)

Indeed, before the creation of the United States Constitution, the Continental Congress declared "that the respective colonies are entitled to the common law, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage . . ." See, *Declaration of Rights of the Continental Congress* (1774), Article 5; reprinted in Tansill, ed., *Documents Illustrative of the Formation of the Union of the American States* (House Document No. 398, 69th Congress, 1st session, Washington: Government Printing Office, 1927), P.3. In addition, Patrick Henry made the following remark at the Virginia Convention on June 20, 1788 when the separate State Legislatures were deciding and debating on whether to adopt the proposed Federal Constitution of 1783:

"The idea which I call true vicinage is, that a man shall be tried by his neighbors and by his peers . . ."

Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, (Philadelphia: J.B. Lippincott Co., 1835) at PP's, 568, 569

Similar remarks concerning where the provisions for trial by jury originated in the Federal Constitution were heard in the Massachusetts Constitutional Convention wherein Delegate Holmes addressed himself to some of the necessities of the federal jury trial provisions, when he stated:

> "It is a maxim universally admitted, that the safety of the subject consists in having a right to a trial free and impartial as the lot of humanity will permit. . . . a person shall . . . have a right to insist on a trial . . . where a jury of the peers would . . . have an opportunity to form a judgement of the character of the person charged with the crime . . .
>
> [W]here a person must be tried by a jury of strangers; a jury . . . may be interested in his conviction; and he may . . . be incapable of making such a defense as he is, in justice, entitled to . . ."
>
> Elliott, *Op. Cit.*, supra, at PP's 109-111 (1835)

The aforestated philosophy of delegate Holmes is used to show the emphasis in which the concept of the Sixth Amendment created a right to jury trials for "peer groups" who were essentially from the same vicinage and of the same relative emancipated age. This was the framers intent.

Once again, the Commonwealth must draw attention to the fact that a juvenile hearing or proceeding has never been conceived to be a regular criminal trial. Rather it is interpreted to be a civil and humane proceeding. Thus, if the petitioners argue that . . .

> "The specific holding in *Duncan* was that the right to a jury trial is a fundamental right and hence must be recognized by the states as part of their obligation to extend due process of law *to all persons within their jurisdiction* . . . the court specifically stated that this due process requirement extended to all persons; no age limitation was placed on this requirement." (Emphasis supplied)

the petitioners would be in error. They would be in error because of the aforementioned historical anaylsis on

where the "right to trial by jury" originated and because of the language found in the *Duncan* case itself. What the Supreme Court meant by saying "to all persons within their jurisdiction" was synonymous to stating: "to all emancipated adult persons undergoing regular criminal trials within their jurisdiction." As a matter of fact, the Court in *Duncan* v. *Louisiana* specifically stated that all persons who are entitled to a jury trial, are also entitled to the express right of being judged by their peers. The Court stated:

> "The framers of the Constitution strove to create an independent judiciary but insisted upon the further protection against abritrary action.
>
> Providing an accused with the right *to be tried by a jury of his peers* gave him an inestimable safeguard against the corrupt and over zealous prosecutor and against the compliant, biased or eccentric judge." (Emphasis supplied)
>
> *Duncan* v. *Louisiana,* 391 U.S. 145 at 156 (1968)

The *Declaration of Rights* in the Constitution of Massachusetts at Point One, Article Twelve also states:

> "XII. No subject shall be . . . deprived of his life, liberty or estate, but by the judgement of his peers . . ."

The aforestated article reveals the fact that in Massachusetts persons are to be essentially tried by their "peers". Massachusetts General Law Chapter 234 Section 1 states in pertinent part:

> "1. A person of either sex qualified . . . shall be liable to serve as a juror, except that the following persons shall be exempt:

. . . . persons under twenty two years of age . . ."
Amended by St. 1969, Ch. 148 section 1.

Thus it can be seen that the Legislature of Massachusetts never intended for juveniles to be "judged by their peers." This statute impliedly recognizes what has been stated for hundreds of years in case law and at common law. For example, in the "heyday" of the common law in England, Lord Coke made the following comment on Littleton's Institute at page 155:

> "He that is of a jury, must be liber homo, *that is not only a freeman and not of bond, but also one that hath such freedom of mind as he stands indifferent* as he stands unsworn." (Emphasis supplied)
> *Wood* v. *United States,*
> 83 F2d 587, 590 (C.A.D.C. 1936)

It may be ironical that the Commonwealth of Massachusetts by insisting that juvenile defendants do not have a right to trial by jury may, in fact, be protecting the interests and welfare of future juvenile offenders. Long ago, the Supreme Court of the United States recognized that there are certain persons who if allowed to sit on a jury might be inherently prejudicial to charged defendants. For example, if the servants of a defendant master, or vice versa, were allowed to sit on the jury, the master, or vice versa, might suffer undue prejudice. See, *Crawford* v. *United States,* 212 U.S. 183 (1909). By the same token, if government employees were allowed to sit on juries at trials in which the defendants were charged with committing crimes against the government, the accused defendants might suffer undue prejudice. See, *Wood* v. *United States,* 83 F2d 587 (1936). This is the point: If juvenile defendants are granted a right to trial by jury, they will

necessarily have to be judged by persons who are at least twenty-two years of age or older. See, *Mass. G.L. Ch. 234 sec. 1* (Amended 1969). It is a matter of common judicial knowledge that most jurors are selected from voter registration lists or from telephone books and that, furthermore, most of the jurors selected are persons who are elderly and non working or persons who do not have regular occupations, therefore giving these stated persons time with which to sit on juries. Thus it can be seen that in a vast majority of the juvenile cases, should a right to trial by jury be granted, the end result would be "children" being judged, not by their peers, but by persons within the community who might possibly be twenty or thirty years older than the defendants and much more likely to be "interested in a conviction." Prejudice might well result to juveniles by having their juries composed predominantly of past or present "parents". Indeed, it may well work to the defendant juvenile's detriment, the fact that many of the older persons who abundantly compose much of today's juries and are themselves parents or even grandparents, might view the defendants more as "recalcitrant children" in need of a "good horsewippin' " (ie.—convictions galore) than as regular criminal defendants entitled to complete indifference.

It is questionable therefore, whether any "humanity" would be shown to a juvenile in a trial by adult jurors—even one designated as a "humane juvenile hearing." See, the *Concurring opinion* of Harlan J. and the *Dissenting opinion* of Burger C.J. and Stewart J., in the case of *In The Matter of Winship*, 397 U.S. 358, 90 S.Ct. 1068 at 1074, 1078, 1079 (1970).

The legislature of Massachusetts has been keenly aware of the 'peer group" problems that juveniles charged with crime would have in seeking a jury trial. In 1962 a report was submitted by the *Legislative Research Council* relative

to a study on an independent system of juvenile courts in order to feasibly find a way of creating a "juvenile jury" system in juvenile courts. Their report spawned some recent 1969 and 1970 House and Senate Bills which might create "juvenile juries." See, *House Document #3737* (1962). In 1969, Senate Act No. 653 was introduced in order to create "juvenile juries." In 1970, Senate Act No. 558 was proposed in order to further study the possibility of creating "teen juries" for juvenile hearings. To a similar effect is House Bill No. 4070 (1970), a bill to study the feasibility of lowering the age requirements for jury service.

The Commonwealth submits that this flurry of proposed legislation shows that the Legislature of Massachusetts realizes the problem of juveniles having a right to jury trials when, in fact, the jury in no way would resemble their "peer group." It is further submitted, that the introduction of the aforestated Acts by various members of the legislature, reveals that both houses of that body are acutely aware of the fact that the Sixth Amendment was enacted by the original framers to give "adults" the benefit of jury trials in regular criminal proceedings, "by their peers". The wisdom and consideration of the legislature in proposing such a concept as "teen juries" should be left to stand by this honorable court. The State legislature should be deemed to be acting in the best interests of the general welfare, health, safety and morals of all citizens within its jurisdiction, including children. In *Mass. G.L. Ch. 119 Sec. 53* the following statement is found:

> "53. . . . the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance. *Proceedings against*

children under said sections shall not be deemed criminal proceedings." (Emphasis supplied)

Finally, to substantiate the Commonwealth's position that juvenile proceedings are not to be thought of as criminal trials but rather as humane and civil hearings, In *Mass. G.L. Ch. 119 sec. 65* the following is stated:

> "Courts shall designate suitable times for the hearing of cases of children under 17 years of age, which shall be called the juvenile sessions . . . said sessions shall be separate from that for the trial of criminal cases, and shall not . . . be held in conjunction with other business of the court, and shall be held in rooms not used for criminal trials . . ."

II.

JUVENILE PROCEEDINGS ARE HUMANE AND CIVIL IN NATURE. THE JUVENILE HEARING IS NOT CLASSIFIED AS A REGULAR CRIMINAL PROCEEDING. FOR THIS REASON AND BECAUSE OF THE DOCTRINE OF STARE DECISIS, JUVENILES HAVE NO CONSTITUTIONAL RIGHT TO A JURY TRIAL WITHIN THE MEANING OF THE SIXTH AMENDMENT OR THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Supreme Court of California found occasion to interpret what was the meaning of *In Re Gault,* supra, in the case of *In Re K.D.K.* when it stated:

> "*In Application of Gault* . . . the Supreme Court found deficient in many respects the procedures by which under Arizona law Gault was placed in an industrial home for boys where he might have been kept until his majority, a matter of about six years. Those

deficiences were inadequate notice of hearing, both as to time permitted for preparation and as to the statement of the alleged misconduct; failure to furnish counsel; use of admissions made by Gault without his having been advised of his rights to counsel and to remain silent; and failure to produce the witness as to the misconduct, whose statement as made to the police was presented at the hearing. The Supreme Court held those defects to be denials of constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution.

* * *

"The Court, however, disavowed any intention to deal a death blow to the juvenile court system. *The majority stated:*

"While due process requirements will, in some instances, introduce a degree of order and regularity to juvenile Court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, *nothing will require that the conception of the kindly juvenile judge be replaced by its opposite,* nor do we here rule upon the question whether ordinary due process requirements must be observed with respect to hearings to determine the disposition of the delinquent child." (Emphasis supplied) *In Re K.D.K.*, 75 Cal. Rptr. 136, 138 (1969)

The decision in *In Re Gault,* supra, and its 1966 predecessor, *Kent* v. *United States,* 383 U.S. 541, have engendered a spawn of law review articles covering specific matters ruled upon in these cases. A symposium was also conducted at Hastings Law School in Los Angeles covering the whole field of proceedings in juvenile Courts, both in theory and practice. See *79 Hastings Law Journal 29, 47* (1967): *Juvenile Justice In California,* a Symposium. In addition,

a team of writers in the Chicago Bar Record, in *From Gault to Urbasek 49 Chicago Bar Record 162*, opines that the maintenance of the existing juvenile court system, while deciding contested jurisdictional allegations with all the procedural rules of a criminal trial, *but without a jury*, is a desirable end well worth the cost.

Most importantly, the Court in *In Re K.D.K.* went on to state:

> "We are of the opinion that *Gault*, does not hold more than that the juvenile is entitled to the full protection *of specific constitutional guarantees, and that the hearing must be fairly conducted within a proscribed framework.*
>
> • • •
>
> *"We are not prepared to depart from the holdings of the California courts that proceedings in the juvenile court are, indeed, of a civil nature.*
>
> • • •
>
> "We are in accord with the view that legislation that places those subject to the jurisdiction of the juvenile court in a different classification from those not so subject, with regard to conduct of the same general character, is constitutional. . . . Juveniles over whom the juvenile court has refused to take jurisdiction have sometimes claimed that such refusal unconstitutionally denied them the benefits of the juvenile court procedure. (For example See, *People* v. *Dotson*, 46 Cal. 2d 891, 895, 299 P2d 875.) (Emphasis supplied)
>
> *In Re K.D.K.*, 75 Cal. Rptr. 136 at 141 (1969)

The Supreme Court of New York Criminal term, in a case entitled *People* v. *K.* stated:

"Last year the United States Supreme Court decided in *In the Matter of Gault* ... that juvenile court proceedings are required to meet constitutional standards of due process as to notice, right to counsel, privilege against self incrimination and the right to confront and cross examine sworn witnesses. Early this year the U.S. District Court . . . in *Nieves* v. *United States,* D.C. 280 F.Supp. 994 stated that the Federal Juvenile Delinquency Act was unconstitutional to the extent that it required a juvenille delinquent to waive his right to a jury trial in order to be proceeded against under the act. That court relied upon *In the Matter of Gault,* supra. I cannot extend *In the Matter of Gault* as the court did in *Nieves* v. *United States,* supra. *I do not read a mandate of a jury trial im the Matter of Gault; on the contrary, I am of the opinion that the Court expressly excluded same."* (Emphasis supplied)

People v. *K.,*
58 Misc. 2d 526 296 NYS2d 404, 405 (1968)

The sound rationale of the learned judge in *People* v. *K.,* supra, may be seen by looking at the majority opinion itself rendered in the case of *In Re Gault* 387 U.S. 1 (1967). Therein, it can be seen that the question of jury trials for juvenile defendants was alluded to by the Court. At page 13 of 387 U.S., the Court said:

"We do not even consider the entire process relating to juvenile 'delinquents.' For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post adjudicative or disposition-process . . . We consider only the problems presented to us by this case. These

> relate to the proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part . . ."

The Commonwealth of Massachusetts maintains that the only interpretation that can be made from the aforestated paragraph is that the court was ruling on the manner in which the trial or proceeding was to be conducted. Again at page 14, the Court continued:

> "From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles. In addition to the specific problems involved in the present case, for example, *it has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury.*" (Emphasis supplied)

The Court continues. In a footnote at page 19 of 387 U.S., the majority opinion quotes the late Chief Justice of the New Jersey Supreme Court:

> ". . . The indispensable elements of due process are: first, a tribunal with jurisdiction; second, notice of a hearing to the proper parties; and finally a fair hearing . . ."

Finally, at page 30, the Court quotes from a previous juvenile case entitled *Kent* v. *United States*, 383 U.S. 541 (1966) by stating:

> *"We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial* or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment." (Emphasis supplied)

It thus becomes obvious that the Supreme Court in *In Re Gault*, supra, was setting down guidelines by which juveniles were to be tried and did not consider a trial by jury essential to due process and trial treatment of juveniles.

The Supreme Court of Oregon in the case of *State* v. *Turner*, seemed to reaffirm the aforestated rationale. In the *Turner* case, supra, the Court specifically addressed itself to the differences between an adult criminal trial and a juvenile delinquency hearing, with the former conceived of as criminal in procedure whereas the latter is considered as civil in nature. The Court stated:

> "The *Gault* decision stops short of holding that trial by jury is mandatory in a juvenile delinquency hearing . . ."
>
> • • •
>
> ". . . two states held, prior to the publication of the *Duncan* and *Bloom* decisions . . . that fairness and basic procedural due process could be assured a juvenile hearing without "the formality of a jury trial." *In Re Estes*, 438 P2d 205 (1968); *Commonwealth* v. *Johnson*, 211 Pa. Super. 62, 234 A2d 9 (1967). After *Duncan* and *Bloom*, *Dryden* v. *Commonwealth*, Ky., 435 SW 2d 457 (1968) also held that a jury trial was not essential to due process in [a] juvenile court.
>
> • • •
>
> Adverting again to the fundamental fact that we are dealing with children and not with adults, the ultimate

question in a juvenile proceeding is not one of "guilt" or "innocence" but rather one of determining what is in the best interest of the child. Many thoughtful students of behavior and rehabilitation believe there are valid policy reasons for holding that due process, when applied to children, does not . . . include the right to have a jury pass upon the question which must lie at the threshold of juvenile wardship." (For examples, see *The President's Commission on Law Enforcement and Administration of Justice,* Task Force Report: Juvenile Delinquency and Youth Crime 38 (1967); Paulsen, *Fairness to Juvenile Offenders, 41 Minn. L. Rev. 547, 559* (1957)

The Supreme Court of Oregon in *State* v. *Turner* continued:

". . . courts have the discretionary power to allow a jury trial for a child . . . by remanding the child to the circuit court to be tried as an adult . . . Moreover, because such a remand carries with it the pains and penalties of the criminal law as well as the procedural safeguards thereof, demand by children for jury trials in the criminal court has not been a common phenomenon. Indeed, in one recent case, a child who had been remanded for trial as an adult unsuccessfully challenged the constitutionality of his remand . . . claiming that the remand denied him due process of law as a child.

• • •

"The crucial distinction between juvenile and other loss of liberty cases is that the juvenile law is dealing with a child and not with an adult. The difficult problem, therefore, is whether the court can give the child

all the rights of an indicted adult without at the same time abandoning the *parens patriae* concept of juvenile justice which has evolved during the past century.

• • •

"It would be simple, by striking down the juvenile code, to return the accused child to the criminal courts and thereby afford him the rull range of constitutional due process which accompanies a criminal trial. The juvenile then would be entitled to indictment, bail, and all other rights of an adult. But the *Gault* case recognized that, despite its faults when loosely administered, the *parens patriae* concept has some residual value, and expressly refrained from a "root and branch" extirpation of the separate juvenile system."

State v. *Turner*,
OR., 453 P2d 910, 911, 913 and 913 (1969).

The petitioners may argue that the Supreme Court of the United States extended the procedural rights of juveniles furthermost in the recent case of *In The Matter of Winship*, 397 U.S. 358 (1970). This assertion would be in error. It would be in error because of the express language as found within that cited case, including the majority, concurring and dissenting opinions.

First, the Majority opinion:

Mr. Justice Brennan wrote the majority opinion. He stated on page 1073 of 90 S.Ct. 1068 (1970):

. . .

"Nor de we perceive any merit in the argument that to afford juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process. Use of the reasonable doubt standard during the adjudicatory hearing will

not disturb New York's policies that a finding that a child has violated a criminal law does not constitute a criminal conviction, that such a finding does not deprive the child of his civil rights, and that juvenile proceedings are confidential. *Nor will there be any effect on the informality, flexibility, or speed of the hearing at which the fact finding takes place.* And the opportunity during the post adjudicatory or dispositional hearing for a wide ranging review of the child's social history and for his individualized treatment will remain unimpaired. Simularly there will be no effect on the procedures distinctive to juvenile proceedings which are employed prior to the adjudicatory hearing." (Emphasis supplied)

Second, Mr. Justice Harlan's concurring opinion:

On pages 1075 and 1078 of 90 S.Ct. 1068 (1970) Mr. Justice Harlan states:

"No one, I dare say, would contend that state juvenile court trials are subject to *no* federal constitutional limitations. Differences have existed, however, among the members of this court as to what constitutional protections do apply . . ."

* * *

"It is of great importance, in my view, that procedural structures not be constitutionally imposed that jeopardize "the essential elements of the State's purpose" in creating juvenile courts, . . . In this regard, I think it worth emphasizing that the requirement of proof beyond a reasonable doubt that a juvenile committed a criminal act before he is found to be a delinquent does not (1) interfere with the worthy goal of rehabilitating the juvenile, . . . (3) *burden the juvenile*

courts with a procedural requirement which will make juvenile adjudications significantly more time consuming, or rigid. Today's decision requires *a juvenile judge* to be more confident in his belief that the youth did the act with which he has been charged." (Emphasis supplied)

Third, the dissenting opinion:

Mr. Chief Justice Burger and Mr. Justice Stewart joined in dissenting to the majority opinion rendered *In the Matter of Winship,* supra. On pages 1078 and 1079 of 90 S.Ct. 1068 (1970) the two Justices stated:

"The Court's opinion today rests entirely on the assumption that all juvenile proceedings are "criminal prosecutions," hence subject to constitutional limitations. This derives from earlier holdings, which like today's holding, were steps eroding the differences between juvenile courts and traditional criminal courts. The original concept of the juvenile court system was to provide a benevolent and less formal means that criminal courts could provide for dealing with the special and often sensitive problems of youthful offenders. Since I see no constitutional requirement of due process sufficient to overcome the legislative judgement of the states in this area, I dissent from further strait jacketing of an already overly-restricted system. What the juvenile court systems need is not more but less of the trappings of legal procedure and judicial formalism; *the juvenile system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court.*

• • •

"Much of the judicial attitude manifested by the Court's opinion today and earlier holdings in this field

is really a protest against inadequate juvenile court staffs and facilities; we "burn down the stable to get rid of the mice." The lack of support and the distressing growth of juvenile crime have combined to make for a literal breakdown in many if not most juvenile courts.

• • •

"My hope is that today's decision will not spell the end of a generously conceived program of compassionate treatment intended to mitigate the rigors and trauma of exposing youthful offenders to a traditional criminal court; each step we take turns the clock back to the pre-juvenile court era. *I cannot regard it as a manifestation of progress to transform juvenile courts into criminal courts,* which is what we are well on the way to accomplishing." (Emphasis supplied)

While the Commonwealth of Massachusetts will concede as Mr. Justice Douglas stated in *Debacker* v. *Brainard*, 90 S.Ct. 163, 167 (1969), that "there are many problems and inadequacies of the juvenile court system," the Commonwealth maintains that the "solution" of this problem is in the creation of "special juvenile courts" with "specific juvenile judges" as was proposed and is currently being studied by the *Legislative Research Counsel* of the Massachusetts Legislature. See, *Report Submitted By The Commission Relative To An Independent System Of Juvenile Courts,* House Document No. 3737 of (1962) and Senate Bills No's. 653 of (1969) and 558 of (1970).

The solution, therefore, is not in the creation of adult jury trials in juvenile proceedings. We must not forget that juvenile proceedings are envisioned as civil and humane in nature; they were never conceived to be accusatory or criminal proceedings. As the Supreme Court of Pennsyl-

vania in *Commonwealth* v. *Fisher* best summed up the motives and rationale behind State Legislatures conceiving and creating separate juvenile proceedings. The Court stated:

> "*To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the legislature surely may provide for the salvation of such a child,* if its parents or guardian be unable or unwilling to do so, by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection. The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to save it and to shield it from the consequences of persistence in a career of waywardness, nor is the state when compelled as *parens patriae,* to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts. *When the child gets there and the court with the power to save it, determines on its salvation, and not its punishment, it is immaterial how it got there.* The act simply provides how children who ought to be saved may reach the court to be saved." (Emphasis supplied)
>
> *Commonwealth* v. *Fisher,*
> 213 Pa. 48, 53, 62 A. 198, 200 (1905)

Wherefore the Commonwealth of Massachusetts respectfully asks this court find that under the doctrines of stare decisis, common sense, humanity to juveniles, the Sixth and the Fourteenth Amendments, juveniles have no constitutional right to a trial by jury.

Conclusion

Wherefore the Commonwealth of Massachusetts as Amicus Curiae in this case, respectfully asks this court find that juveniles do not have a right to a jury trial in their juvenile hearings within the meaning of the Sixth or Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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